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490.

QUATENUS REIPUBLICÆ INTERSIT, UT JURISPRUDENTIA ROMANORUM INTER LITTERAS FERE HUMANIORES COLENDA PROPONATUR.

ORATIO

IN THEATRO SHELDONIANO HABITA

DIE JUNII XVI MDCCCXLVII.

OXONII
FRANCISCUS MACPHERSON
MDCCCXLVII.

26331 e. 1

OXONII:
EXCUDEBAT I. SHRIMPTON.

QUATENUS REIPUBLICÆ INTERSIT, UT JURISPRUDENTIA ROMANORUM INTER LITTERAS FERE HUMANIORES COLENDA PROPONATUR.

LEGEM[a] tanquam in sinu Dei habitantem, cui quicquid in cœlo, quicquid est in terrâ, pareat, quam linguis dissonis uno animo gentes omnes pacis sibi et felicitatis originem fateantur, si cœperim hôc in consessu prædicare, haud injuriâ me gloriosæ vaniloquentiæ cuncti arguatis: neque enim deest in tantis laudibus auctorum copia, nec cuiquam certè vestrûm in mentem venit de præstantiâ legis dubitare. Sed neque a me illud jam posci arbitror, ut doceam, legum Romanarum cognitio quantam lucem oratorum, quantam poetarum, quantam denique historicorum libris possit offundere: quanquam certè, si quem litterarum studia delectant, "plurima est" ut ait Tullius[b] "in omni jure civili antiquitatis effigies, quòd et verborum prisca vetustas cognoscitur, et actionum genera quædam priorum hominum consuetudinem vitamque declarant." Quippe

[a] Hooker, Eccl. Pol., b. i. ch. xvi. 8.

[b] De Oratore, lib. i. ch. 43.

nobis hâc ratione latior, angustior illâ quæstio proponitur. Dicendum enim est, Reipublicæ intersit necne, ut jus illud Romanum, quod, quum quadringentos[c] fermè annos hâc in urbe diligentissimè excultum esset, duo jam sæcula magis indies neglectum, nostra demum ætas (ut ita dicam) in bibliothecarum tenebras abscondidit, juventutis studiis iterùm commendetur. Quod si defenderim (defensurum verò me jamjam polliceor), indicandum priùs erit quibus de causis studia ista interciderint, et vetera quædam crimina diluendum, quàm ad id me accingam, ut morem tam diuturno consensu antiquatum denuò vobis nitar suadere.

Invenio igitur priscos[d] illos obtrectatores, qui initium recedendi ab hâc disciplinâ fecerunt, duo maximè convicia jactavisse; primum, quòd propter multitudinem librorum et importunam interpretum subtilitatem difficilis esset Romani juris cognitio; deinde, quòd et

[c] Sc. from A.D. 1149, when we first hear of a reader in Roman law at Oxford, Vaccarius, to the middle of the sixteenth century. The decline of the study consequent on the Reformation is alluded to by Hooker, (chap. viii. 4. of Preface to Eccl. Pol.,) and asserted by Zouch in the Preface to his Elementa Jurisprudentiæ. See also Two Discourses delivered in the Middle Temple Hall, by George Long, notes to pp. 86, 87. (London, 1847.)

[d] For these two charges see the Preface to Zouch's Elementa Jurisprudentiæ, (Oxford, 1636.) Bp. Cooper (1588), who is cited by Keble in a note on the Pref. to the Eccl. Pol., ch. viii. 4, seems to assume that in England the study of the *civil law* was only kept up by the need of it in courts governed by the *canon law*.

inutilis, quum a reipublicæ hujusce nostræ institutis planè abhorreret. Et ad alterum quidem satis erit respondere, fieri omninò non posse, ut auctoris alicujus utilitatem interpretum aut ineptiæ aut argutiæ tollant: nemo enim est, ut opinor, tam delirus, qui neget juris Justinianei satis peritum esse quenquam, qui non immensam illam commentariorum multitudinem ab ovo ad usque mala pertractaverit; quum præsertim nihil[e] magis in Imperatore laudetur quàm brevitas, quàm concinnitas, quàm simplex quoddam et quasi pellucens orationis genus. In altero verò vim omnem eam positam esse sentio, quæ doctrinam istam quasi e curriculo studiorum exterminavit: id quod mihi tum aliis indiciis tum illo maximè comprobatur, quòd usque ad hanc ætatem leguntur[f] apud Scotos Justiniani libri, qui cognationem[g] juris sui cum Romano nunquam dissimulaverunt. Nostros autem scriptores incredibile[h] est quàm valdè delectaverit

[e] See Melanchthon in his Oratio de Legibus, and Long, Two Discourses, pp. 26, 77, 91.

[f] Lectures on the civil law are still delivered at Edinburgh on account of its bearing on Scotch law.

[g] "The Scotch institutional writers (Erskine, &c.) were led by their own law to look to the Roman."—Long, Two Discourses, p. 63.

[h] "A persuasion hardly to be eradicated from the minds of our lawyers, that the English law has continued very much in the same state from an antiquity to which they will allow hardly any sort of bounds. Also, that it was formed and grew up among our-

vetus illa necdum penitùs explosa fabula, quæ non solùm ante lunam ortum jus quod dicitur commune fingit, verùm etiam quum usu tantùm, non scripto, sit traditum, nihil tamen alieni exempli tot annis in se recepisse confidentissimè asseverat. Sed hôc de genere omni alius erit locus dicendi, quum pars longè maxima disputationis nostræ in illo verti debeat, ut hanc ipsam opinionem omnium animis, si quà fieri possit, extorqueamus. Illud tantùm hoc temporis petiverim, ne obsit mihi clarissimorum[1] virorum auctoritas, qui nihil omninò Romanum in foro nostro voluerunt agnoscere. Liceat mihi hâc in causà illius[k] verbis uti, a quo plurima me sumpturum esse video, qui quum hæc ipsa fateatur de quibus loquimur longè aliter a se quàm ab heroibus anteactarum ætatum dijudicari, causas tamen dissensionis in auctus illos atque processus derivat, quos in re historicâ recentiora sæcula habuêre. "Quòd

selves; that it is in every respect peculiar to this island; and that if the Roman or any foreign laws attempted to intrude into its composition, it has always had vigour enough to shake them off, and return to the purity of its primitive constitution."—Burke, An Abridgment of English History, book iii. ch. ix. See also to the same purpose Blackstone, Introd. to Commentaries, § 3. p. 64, (Oxford, 1765:) also Robertson, Charles V., sect. i. note xxv.

[1] Such as Fortescue, Popham, Hale, Coke, and (more doubtfully) Blackstone.

[k] Spence, in a work entitled The Equitable Jurisdiction of the Court of Chancery, (London, 1846,) in which the obligations of our law to that of Rome are very fully and carefully investigated.

si quid" ait "correxisse videor, in quo viri olim doctissimi erraverunt, hoc non ingenio meo, sed felicitati temporum tribuendum est. Equidem sanè mihi ita persuadeo, Blacstonium illum, si iis historiæ adjumentis usus esset, quibus hodie utimur, rem omnem prorsùs aliter constituturum fuisse." Enimvero (ut omittam alia, quæ sibi quisque facilè in mentem revocet) nonne[1] his primùm temporibus dedocuit nos Savignius somniare, ignoratum fuisse totâ Europâ jus Romanum, donec Florentinum illud Pandectarum exemplar in civitate Neapolitanâ repertum sit? Nec tamen illud equidem prætermittendum duco, quòd[m] in istâ fabulâ, nî fallor, ii ipsi scriptores, quorum maximè auctoritatem deprecatus sum, dubitanter se et quasi in re parùm exploratâ gerunt.

[1] "Long and generally it was believed that Roman law had fallen with the empire to be resuscitated in the twelfth century by the discovery of a manuscript of the Pandects found at Amalfi. This is the error that M. Savigny has wished to dissipate. The demonstration is convincing, and his end fully attained."—Guizot, Hist. of Civilization, (Bogue's European Library,) sect. xi. vol. ii. p. 2. For specimens of the old belief, see Robertson, Charles V. sect. i. 7, and note xxv.; Hume, Hist. of Engl., ch. 23; Blackstone, vol. ii. ch. iv.

[m] This is especially true of Blackstone, who often talks as if there were nothing Roman in the common law: yet says distinctly that its claim to be considered indigenous "must be understood with many grains of allowance," (Introd. to Comm., p. 64,) and even gives instances of doctrines found in it of Roman origin. Vol. ii. pp. 64, 328. Cf. also pp. 22, 35, of the Introductory Lectures in vol. i.

Jam vero, ut ad institutum tandem revertar, credo equidem e republicâ esse, ut Romanæ leges iterùm in manus litterarum studiosis tradantur; idque tres ob causas præcipuè: primùm, quòd leges sint unæ omnium optimæ; deinde, quòd totius ferè Europæ communes; denique, quòd ex his tanquam principiis Anglorum jura aliquâ saltem ex parte, ne dicam maximâ, videantur originem traxisse.

Primùm igitur, juris Romani virtutes quibus verbis possim exponere? quid est, quod in tantâ laudatorum copiâ inauditum me allaturum sperem? Possum sexcenta[n] vobis testimonia citare nominibus satis honestis commendata; verùm, ut de cæteris conjecturam facere possitis, quæ præstò sint unum tantùm et alterum apponam. Dicuntur reges Francorum[o] edixisse, ut ii qui legibus Romanis in judiciis nusquam uterentur, ediscerent tamen apud Academiam, quòd effata[p] meræ rationis essent litteris mandata. Invenio alios[q] qui

[n] See a large collection of this kind in Taylor's Elements of the Civil Law, pp. 136-7.

[o] "Philippe-le-Bel fit enseigner les Loix de Justinien, seulement comme Raison écrite dans les paix de la France qui se gouvernoient par les Coûtumes."—Montesquieu, Esprit des Loix, liv. xxviii. ch. 42. Cf. also Hallam's Middle Ages, vol. iii. p. 517. (London, 1819.)

[p] Even Blackstone allows the excellence of the civil law "as a collection of written reason."—Introd. to Comment., § 1. p. 5.

[q] Damhoud, Prax. Rer. Civ., c. 12. [quoted by Taylor, p. 137.]

confirment, "ita justum et æquum visum esse omnibus jus Romanum, ut qui Romanis legibus non tenentur, illud tamen tanquam Æquitati Naturali maximè consentaneum sequantur, et suas leges per has interpretentur." Non dubitaverunt alii[r] jurisprudentiam Romanorum Græcis omnibus philosophis anteponere; quibus videtur Tullius[s] ipse magnificam illam sententiam præivisse. Eidem non spernendi vir ingenii Melanchthon[t] asserenti suffragatus est, "Romanas leges naturæ maximè omnium consentaneas esse," addiditque[u] de suo, "in iis tot exstare gnomas quot leges, erutas ex intimis sapientiæ penetralibus, ex doctissimis Poetarum, Oratorum, et Philosophorum monumentis." Haud scio an magis apud nostros illius[x] viri valeat auctoritas, qui, quum nec juris esset ipse nec sapientiæ rudis, pro thesauro sapientiæ jus civile habuit. Sed quid plura adducam? quum referti sint horum præconiorum libri omnes; quum idem ferè sonet gens omnis, omnis ætas, omne litterarum genus. Constat autem in turbâ acclamantium summo hoc consensu

[r] Gravina, Præf. ad Origg. Jur. Civ. [quoted by Taylor]. Cf. Melanchthon, Oratio de Legibus, pp. 30, 31. (Paris, 1534.)

[s] De Oratore, lib. i. ch. 46. "Fremant omnes licet," &c.

[t] De Legibus, p. 28.

[u] Id., p. 33.

[x] Hooker, Pref. to Eccl. Pol., ch. viii. § 4. "Great cause I see there is to wish that more encouragement were given" to the study of the civil law, "as well for *the singular treasures of wisdom therein contained*, as," &c.

approbari, maximè omnium Romanas leges æquum illud quod appellant et bonum redolere, ut ex jure naturali apertissimè peti videantur. Quod quâ ratione factum sit, operæ pretium fortasse erit disserere, quum præsertim[y] dignæ sint juris Romani origines, quæ cujusvis oculos et mentem in se convertant.

Natum[z] scilicet inter discordiam civium in seditione sævissimâ, immò nonnullâ ex parte ab hominibus[a] perditissimis descriptum (ut omittam illud, quòd contra[b] naturam et mores ex gente dissimillimâ in Urbem perhibetur venisse) augebatur identidem legibus[c] plebiscitisque per vim, per coitiones, interdum etiam per fraudem latis, magistratuum annuorum edictis, doctorum hominum temerariis interpretationibus. Inde,

[y] "It is certainly worth enquiry how a state that till the time of Augustus was always at war with its neighbours, or distracted by internal struggles, laid the foundation of so many just and useful rules for the regulation of the ordinary concerns of life."—Long, Two Discourses, &c. p. 53.

[z] Livy calls the twelve tables "fons omnis publici privatique juris;" it is not of course meant to assert that the Romans had no *customary law* before: they were the fruits of the nine years contest (A.U.C. 292—300) about the Terentilian rogation.

[a] Such as Appius, Oppius, and others in the second decemvirate.

[b] On the embassy to Athens see Long, Two Discourses, pp. 55, 56, and the note to p. 56.

[c] For these various sources of Roman law (and especially for the distinction between the early lawyers of the republic, and the privileged exponents of the law under the empire) see the Digesta, lib. i. tit. ii. "De Origine Juris."

postquàm Urbs dominum accepit, jurisconsultorum responsa jam Cæsaris auctoritate firmata, senatûs-consulta, decreta Principum vastam priùs molem ad immensum extulêre. Accedebat[d] his comes perpetua atque interpres legum consuetudo, cujus vim quum nemo adhuc satis arctè definiverit, nemo certè tam licenter, quàm Romani, voluit patere. Neque in his rerum miraculis illud credo prætermittendum, quòd temporibus[e] vitiosissimis probatissimi jurisconsulti exstiterunt; quòd exstinctâ jam et libertate et virtute populi Romani emendatæ leges sunt, ordinatæ, absolutæ; quòd denique Imperatores[f] nequissimi, permultis rebus optimè constitutis, memoriam sui non inhonestam in jure civili reliquerunt. Exemplo est, ne plures appellem, Caracalla iste, cujus nomen abominari

[d] See Julian, Dig. i. 3. 32. 1. [quoted by Taylor, p. 241.] "Inveterata consuetudo pro lege non immerito custoditur. Nam cum ipsæ Leges nullâ aliâ ex causâ nos teneant, quàm quòd judicio populi receptæ sunt, meritò et ea quæ sine ullo scripto populus probavit, tenebunt omnes. Quare *rectissimè etiam illud receptum est, ut tacito consensu omnium per desuetudinem abrogentur.*

[e] In unbroken succession through the confusion of the civil wars and the corruption of the empire from Q. Mucius Scævola, who was consul in the year B.C. 95, to Modestinus, who seems to have been alive A.D. 239. See Long, Two Discourses, p. 71.

[f] "Under the weakest and most vicious reign the seat of justice was filled by the wisdom and integrity of Papinian and Ulpian: and the purest materials of the Code and Pandects are inscribed with the names of Caracalla and his ministers."—Gibbon, Decline and Fall, ch. xliv.

omnis didicit posteritas. Postremò[g] vero ex hôc acervo ingenti tam variæ tamque indigestæ materiæ conflatum est corpus[h] illud quod dicitur juris Justinianeum, in quo quæcunque possint reprehendi vitia, haud facilè tamen quisquam negaverit, perfectissimam post homines natos juris descriptionem contineri.

Quid ergo dicemus? quibus de causis putabimus evenisse, ut harum legum utilitas tam latè pateat? An præclarâ quâdam ingenii dote et quasi acie mentis sagacissimâ ipsum[i] illud justum ab initio perspexisse Romanos, quod Plato quæritabat; quod quum semel scripto monstratum esset, probari cæteris gentibus in æternum necessariò deberet? Equidem sanè multum abest ut diffitear et singulari quâdam leges condendi facultate usos esse Romanos et ingenium illud simplex, forte, masculum, tam ad definienda jura quàm ad injungenda orbi terrarum natum: idem tamen crediderim, non de suo solùm eos, quamvis inexhausto, penu præcepta illa atque elementa hausisse justitiæ, propter

[g] The Institutions of Gaius, the "Edictum Perpetuum" of Hadrian, and the Gregorian, Hermogenian, and Theodosian codes, have been passed over here, as partial, unauthorized, or not of lasting validity.

[h] A title invented by Justinian himself (Cod. 5. tit. 13. s. 1.) It comprises his *Codex*, (first published A.D. 529, republished with corrections A.D. 534,) *Institutiones*, (A.D. 533,) *Pandectæ* or *Digesta*, (533,) and *Novellæ*, (issued later, and collected after his death.)

[i] *αὐτοδίκαιον, τὸ εἶδος, τὴν ἰδέαν*, &c.

quæ jus Romanum pro jure gentium haberi solet. Quippe[k] prætores qui jus tùm civibus tùm peregrinis domi forisque dicturi essent, ea edicta debebant proponere, quæ diversarum gentium conditioni accommodata essent: quod ut facerent, transcurrere eos et quasi exsuperare juris Quiritium limites oportebat, quo nemo[l] ferè tenebatur unquam nisi civitatis munere idem uteretur. Prætereà, quum ex legibus alienis[m] judicia in provinciis exercerent, fieri non poterat quin, si quid aliquo in genere æquiùs apud socios quàm Romæ constitutum esset, id quasi civilis scientiæ incrementum domum secum ad suos reportarent. Quamobrem prætorum edictis existimandum est latiora jura in Urbem

[k] For this view of the effect on Roman law of the prætorian jurisdiction, see Long, Two Discourses, pp. 62—66; esp. p. 63: "It is to the extended intercourse of the Roman with other people that we must attribute the development of that part of their system which consisted in the admission of those rules which the common understanding of mankind in all ages and in all countries has recognised to be right, or just, or equitable." Again, p. 67: "By an acknowledgment and reception of universal principles the Roman system obtained a practical adaptation to all useful purposes."

[l] See e. g. in proof of this, Livy, b. ix. c. 43. "Hernicorum tribus populis .... *quia maluerunt quam civitatem*, suæ leges redditæ."

[m] For examples of this see the Orations against Verres, e. g. act. ii. lib. ii. c. 37. "Sthenius postulat, ut cum secum sui cives agant de litteris publicis corruptis, ejusque rei legibus Thermitanorum actio sit; cum senatus populusque Romanus Thermitanis, quòd semper in amicitiâ fideque mansissent, urbem, agros, legesque suas reddidisset."

pervenisse, eòque latiora, quò latiùs imperium extendebatur; donec eò usque ventum esset, ut quum imperium Romanorum, quod illi magnificè ementiebantur, ad universum orbem terrarum pertineret, jura etiam omnium gentium jus unum Romanum complecteretur.

Hactenùs quæ fuerit legum Romanarum præstantia, et quam originem habuerit, indicavi: venio ad id, quod posui, totius eas Europæ communes esse.

Invenio igitur tum quum barbari ex diversis partibus in orbem Romanum irrupêre, omnes ferè homines qui in provinciis habitabant communi[n] nomine Romanos appellatos legibus etiam Romanis paruisse. Postquam enim propter diuturnitatem imperii connubiis commerciisque mores Itali in ultimas regiones divulgati essent, confusoque gentium discrimine propriæ illæ leges obsolevissent, quas olim sibi quisque populus victorum beneficio retinuerat, civitatem[o] Caracalla omnibus ita communicavit, ut quæcunque oppida in provinciis essent, conditione municipiorum frueren-

[n] For example, in the kingdoms founded by the Burgundians, Franks, and Visigoths, the conquered provincials were called, in contradistinction to the invaders, not Gauls, Œduans, &c.; but *Romans*. See Montesquieu, Esprit des Loix, liv. xxviii. ch. 2, 3, &c.: also Guizot, Hist. of Civilization, sect. xi, &c.; and the ancient laws cited in both authors.

[o] Smith's Gr. and Rom. Biograph. and Mythol. Dict., art. "Caracalla," where however it is suggested, that Caracalla's measure had been in the main anticipated by M. Aurelius.

tur. His[p] autem non solùm corrupto imperio legum Romanarum usum victores novi concedebant, verùm etiam quum[q] populos suos instruere legibus barbarorum reguli cogitarent et consuetudines patrias in modum quendam atque ordinem describere, curabant iidem ut Romanæ etiam leges in unum coactæ proferrentur, quò certior utrique populo norma juris ac judiciorum constaret. Itaque memoriæ traditum est, ante inchoatum Justiniani opus tres[r] juris Romani codices a regibus barbaris esse editos: quorum unum[s] Romæ Theodoricus tam Ostrogothis suis quàm Italis observandum promulgavit; alterum[t] Romanis in Aquitaniâ et in Galliâ Narbonensi habitantibus Alaricus

[p] For one of many examples see the Preface to the Law of the Burgundians, (Guizot, Hist. of Civil., sect. xi.) "We order that Romans be judged according to Roman laws, as was done by our ancestors." But in point of fact in those times all laws were *personal* and not *territorial* in their authority, followed *races* and not *countries*. See Montesquieu, Esprit des Loix, liv. xxviii. ch. 11, &c.

[q] Guizot, Hist. of Civilization, sect. xi.; also Smith's Biogr. and Mythol. Dict., art. "Justinian," p. 666.

[r] Long, Two Discourses, &c. p. 81.

[s] "The 'Edictum' of Theodoric was promulgated at Rome A.D. 500, and intended *both for the East Goths and his Roman subjects*." Long, ibid. This is a singular exception to the rule of distinct, parallel codes.

[t] "The 'Breviarium Alaricianum,' which was compiled" for the use of his Roman subjects "by command of Alaric II. king of the Visigoths, was promulgated A.D. 506."—Long, ibid.

Gothorum stirpis alterius ductor; tertium[u] Burgundionum reges. Exinde quò magis bini populi in unum coalescebant, una[x] etiam lex indies, unus mos fiebat: in quo nemo, ut opinor, admirabitur, priores[y] ferè semper Romani juris partes fuisse; quum antiquæ illæ barbarorum leges rudes planè atque inconditæ essent, nec quidquam[z] ferè, quod magnitudini negotiorum conveniret, de pactis conventis, emptis venditis, locatis conductis, cæterisque hujusmodi definirent.

Sed quum longum sit singularum gentium annales repetere, uno verbo dixerim, ante susceptum Carolo Magno Romanorum imperium eas consuetudines apud Longobardos[a] (nedum in cæterâ Italiâ), apud Gothos[b] in Hispaniâ, apud Francos Galliæ[b] jam omnis dominantes invaluisse, quæ colorem verè Romanum præ se

[u] "The 'Lex Romana,' was compiled for the use of the Roman subjects in the Burgundian kingdom, between A.D. 517 and A.D. 534."—Ibid.

[x] For the progress of this change see Montesquieu, Esprit des Loix, liv. xxviii. ch. 4—12.

[y] "In this fusion of the two societies, in proportion as it was brought about, the Roman element dominated more and more." Guizot, Hist. of Civilization, sect. x.

[z] On the disproportion between the spaces occupied by penal or criminal and by civil legislation in, for example, the Salic, Ripuarian, and Burgundian codes, see Guizot, Hist. of Civilization, sect. ix, x.

[a] Montesquieu, Esprit des Loix, liv. xxviii. ch. 6.

[b] Guizot, Hist. of Civilization, sectt. viii, x. In A.D. 542, the Visigoths retained Languedoc only on the French side of the Pyrenees. Cf. for Spain Hallam's Middle Ages, vol. iii. p. 516. Also Long, Two Discourses, p. 92, note.

ferrent. Excipio[c] publica illa judicia, quibus vis, furtum, cæteraque delicta vindicarentur: quo in genere haud scio an uberiora paullò barbarorum fuerint ingenia; nulli certè harum gentium, quibuscum vivimus, pars ista Romani juris tam accepta videtur unquam fuisse quàm reliquæ. Quibus[d] consuetudinibus quum codex ille Justiniani supervenisset, qui (seu notus fuerit in Europâ antehàc seu delituerit[e]) anno demum posteà tercentesimo Bononiæ publicè[f] legi cœptus est, apud nonnullos statim in judiciis proferebatur, et auctoritatem omnem legis obtinebat. Reliquâ[g] autem

[c] "A large part of the Roman law is not directly applicable to modern purposes, such as the law relating to crimes and punishments," and in general that which was called 'Publicum Jus' as distinguished from 'Privatum.' Long, Two Discourses, pp. 39, 40.

[d] "Quand la compilation de Justinien parut, elle fut reçue dans les Provinces du domaine des Goths et des Bourguignous comme *Loi-ecrite*, au-lieu que dans l'ancien Domaine des Francs elle ne fut que comme *Raison-écrite*."—Montesquieu, Esprit des Loix, liv. xxviii. ch. 12.

[e] See Hallam's Middle Ages, vol. iii. p. 513, and Smith's Biograph. Dict., art. "Justinian."

[f] Irnerius is said to have been the first lecturer in the civil law at Bologna in A.D. 1137. Long, Two Discourses, p. 84. Robertson, Charles V. sect. i. note xxv.

[g] "In some countries of Europe the Roman law was adopted as subsidiary to their own municipal law; and all cases to which the latter did not extend, were decided according to the principles of the former. In others the maxims as well as forms of Roman jurisprudence mingled imperceptibly with the laws of the country,

Europâ, tametsi foro careret, tamen, quum summâ industriâ a doctissimo quoque tractaretur, non poterat quin juri non scripto permagnum momentum faceret. Quid de Germaniâ[h] dicam? quæ quum maximâ ex parte Romanæ nunquam ditionis fuisset, leges[i] tamen Romanas suâ sibi sponte adscivit. Initia rei Imperatores[k] fecêre; deinde singulæ nationes, prout cuique usui fore videretur, sive prætermissum aliquid in legibus patriis sive iniquiùs sive obscuriùs positum esset, supplementa hinc, auxilia, interpretationes petebant. Exemplo sit id, quod apud Melanchthonem[l] legitur: "Vernaculo quodam jure Saxones adhuc alicubi utuntur, in quo quàm multa ex Romanis legibus emendata sunt! Quid fuit minùs humanum, quàm quod vetuêre Saxones, ne nepotibus amisso patre avita hæreditas væniret? Correcta lex est in comitiis populorum Ger-

and had a powerful, though less sensible, influence in improving and perfecting them."—Robertson, Charles V., sect. i. 7.

[h] "The Roman law forms the acknowledged basis of decision in all the Germanic tribunals, sparingly modified by the ancient feudal customaries, which the jurists of the empire reduce within narrow bounds."—Hallam, Middle Ages, vol. iii. p. 516.

[i] Melanchthon. Oratio de Legibus, pp. 5, 29, 36. Long, Two Discourses, p. 39.

[k] "Germany, which was never conquered by the Romans, has received *through the Germanic empire* the Roman law as its common law."—Long, Two Discourses, p. 88.

[l] De Legibus, p. 29.

maniæ, latumque ut deinceps Romanum jus eâ parte Saxones sequerentur." Batavos[m] quoque Romano jure solitos esse uti accepimus. Minimè[n] verò existimandum est, id me niti ut vobis persuadeam, legibus integris aut Theodosii aut Justiniani nationes se barbaras addixisse: quod contra multa modis multis pro gentium, regionum, temporum diversitate novari debuerunt. At mihi quidem videntur (ut paullò audaciùs loquar) populorum Europæorum leges quasi ex corpore Romani juris pullulavisse: quod quum a barbaris de Capitolio dejectum esset, Homerico illo Gigante majus, non septem[o] modò jugera sed totum orbem terrarum immensâ mole desuper urgebat. Hinc[p]

[m] See a citation from Van Leeuwen, by Blackstone, Introd. to Comment. § 1. pp. 14, 15: also Long, Two Discourses, note on p. 92.

[n] "In perpetuating itself the Roman law altered; after having been written, the barbaric laws were perverted. Both are among the number of the essential elements of modern society; but as elements entering into a new combination."—Guizot, Hist. of Civ., sect. xi. sub fin.

[o] Ἑπτὰ δ' ἐπέσχε πέλεθρα πεσών. Il. φ. 407.

[p] "Hodie jus civile Romanorum quasi gentium quoddam jus commune apud totam fere Europam observatur, utique in quibus causis propriæ leges et consuetudines deficiunt."—Vinn. Comment. ad Inst. [quoted by Taylor, Civil Law, p. 137.] See also Hume, Hist. of England, ch. xxiii. Robertson, Charles V., sect. i. 6—7, and notes xxiv, xxv. Blackstone, vol. i. pp. 5, 15, 18; vol. ii. p. 424. Hallam's Middle Ages, vol. iii. pp. 516, 520. Long, Two

urbium conditores juris regulas, hinc principia, hinc etiam interdum verba legum formulasque hausêre: quæ quum posuissent quasi fundamenta, his qui successerunt quantum de suo in legum tabulas intulerint, non nostri est instituti disquirere; quum nisi ad unam omnes abrogatæ essent antiquæ leges, et exulare jussi cum libris suis istius juris periti, non potuisset labes originis Romanæ tam penitus infixa aboleri.

Jam vero, ut ad id tandem aggrediar, quod cupidissimè a me exspectari sentio, quid de Angliâ existimabimus? an hæc aliâ in causâ est, aliâ cæteræ Europæ partes? Namque, ut jus civile meritò efferatur laudibus voceturque non Romanum solùm sed etiam vel Europæum vel gentium, parùm tamen præconia ista ad rationem meam probandam sufficient, siquidem nihil omninò cum nostro jure commune habeat.

At verò et[q] proprium quiddam præ se ferunt nostri hujusce juris origines, quod non in reliquâ Europâ inveniatur, et[q] eædem tamen nonnullam contagionem

Discourses, pp. 39, 40, 84, 85, 92, &c. &c., esp. 22: "The best part of the Roman law became, and is, universal."

[q] The difference between the cases of England and other European countries is taken to be this. In them usually two systems of law existed side by side—*often in writing*—a Roman and a barbarian: from the coalition of which resulted the Roman-like laws of the continent. In England it is supposed, that the Saxon codes stood alone, and in consequence the Roman element came in entirely *from without*, through clerical legislators and lawyers. Cle-

exempli Romani admiserunt. Non enim duabus gentibus reges Saxonici jus debebant describere, sed suis solùm popularibus; quippe Britanni veteres aut ad internecionem deleti aut in ultimas regiones insulæ rejecti erant: quamobrem nulla hic, ut in aliis vidimus, Romanarum legum facta est promulgatio, nec duplex quasi fundamen jactum, unde mistarum consuetudinum moles aliquandò oriretur. Aderant tamen scribendis legibus, immò ipsi scribebant, clerici[r] (licet enim in re Tullio inauditâ verbum minimè Ciceronianum proferre); qui, quum Romæ plerique nati essent, Romanis certè omnes litteris imbuti, neque in ordinando jure neque in definiendo neque in edendo tam religiosi esse poterant, ut inclyta illa prudentiæ monumenta nunquam omninò respectarent. Argumento sunt tituli[s] illi magnifici, quibus reges suos decoraverunt, usitati

rical influence has not been mentioned in speaking of the rest of Europe, because it was not the only or even primary cause of the Roman colour of European law: though it doubtless contributed greatly to that result, as the clergy of all Europe was one corporation, and equally interested in the Roman law. Burke considered "the Roman law to have utterly expired in this island together with their empire, and that too before the Saxon establishment." Abridg. of Eng. Hist., b. iii. ch. 9. Spence seems to suppose that the Britons were not exterminated, nor all remains of their laws utterly swept away. Equitable Jurisdiction of the Court of Chancery, vol. i. pp. 4, 10, &c. So also Long, Two Discourses, p. 87.

[r] Burke, ibid. Spence, vol. i. pp. 10—19, &c.

[s] "Imperator," "Basileus," &c. Spence, vol. i. p. 11.

quidem in aulâ Cæsarum, Germanorum veterum libertati parùm convenientes. Sed tamen non est, cur titulos diligentiùs ponderemus: quum et complura[t] prudentiæ Romanæ effata ad verbum a Saxonibus expressa inveniamus, et vetus sanè auctor Beda[u] primum[x] Angliæ legislatorem doceat "judiciorum decreta juxta exemplar Romanorum cum consilio sapientium constituisse." Et fontem quidem, ut opinor, indicavi, unde primam originem habuit quodcunque juris Romani hâc in republicâ observatur: non vetustas illas leges dico, quæ quamdiu valuerint incertum est (etsi incredibile sit penitùs[y] omnia Normannos evertisse), sed clericorum potiùs auctoritatem. Nam quum annis pœnè sexcentis[z] ab Augustini adventu nemo[a]

[t] Burke, (ibid.) enumerates three such; viz. 1. "Justum est ut proles matrem sequatur." 2. "Negatio potior est affirmatione." 3. "Possessio propior est habenti quàm deinceps repetenti."

[u] Hist. Eccl., ii. ch. 5. [quoted by Spence, p. 11.]

[x] Ethelbirht, king of Kent, A.D. 596—623.

[y] Contrast on this point Blackstone, vol. i. p. 17, and Burke, Abridg. of Eng. Hist., book i. ch. 9.

[z] That is, till the contest between the civil and common law in the thirteenth century bred a school of lay lawyers. See Blackstone, vol. i. p. 19, &c.

[a] "Law now" (in the time of William the Conqueror) "became a science, which at first fell entirely into the hands of the Normans: and which, even after it was communicated to the English, required so much study and application, that the laity in those ignorant ages were incapable of attaining it, and it was a mystery

ferè laicus litterarum studiis operam insumeret, necessitate magis quàm consilio factum est, ut et interpretatio legum et administratio ad clerum pertineret. Orabant hi causas, hi judicabant; hi, si quid novi statuendum esset, in consilio erant regi; si promulgandum, senatui intererant; si mandandum litteris, scribarum munere fungebantur. Romano autem jure iidem quàm valdè delectarentur, tùm ex[b] eâ necessitudine quæ iis cum Româ erat conjectare licet, tum plurimis[c] indiciis demonstrare. Namque, ut eos solùm adducam, qui provinciæ Cantuariensi præfuerunt, Lanfrancus[d] quidem priùs quàm in hæc regna venerit, in Galliâ jus Romanum publicè legisse fertur: Theobaldus[e] autem et Justiniani libros secum in Britanniam invexit, et inclytum illum Thomam[f], qui sibi olim successurus erat, Bononiam ad Irnerium misit. Idem Vaccarium[g], doctum hominem, hâc in urbe perhibetur constituisse, qui juventuti jus civile traderet: ex quo

almost solely confined to the clergy, and chiefly to the monks." Hume, Hist. of Engl., Appendix ii. Cf. Blackstone, vol. i. p. 17. Robertson, Charles V., sect. i. 6. Spence, vol. i. p. 14.

[b] Burke, Abridg. of Eng. Hist., b. i. ch. 9. Spence, vol. i. pp. 16, 17.

[c] Robertson, Charles V., note xxiv.

[d] Long, Two Discourses, pp. 85, 86, and the note.

[e] Ibid.

[f] Thomas à Becket. Ibid.

[g] Ibid. But see also Hume, Hist. of Eng., Appendix ii. Blackstone, vol. i. p. 35. Robertson, Charles V., note xxv.

quadringentos[h] fermè annos in Academiâ nostrâ studia ista summâ cum laude viguerunt.

Et primò quidem cautiùs agebant clerici, atque agrestem[i] illam veterum legum feritatem ad exempla meliora sensim refingebant: posteà autem quàm nomen Justinianei codicis in Europâ percrebruisset, apertiùs grassabantur, necnon ipsis in judiciis interdum auctores Romanos adhibebant. Tum[k] demum a proceribus reclamatum est: qui quum jus illud, quod suo in foro usurpabant clerici, distare paullulùm a Romano sensissent, jamdiu verebantur, ne foro etiam regio Justinianus majorum instituta pelleret. Itaque interdictum, ne quis libros Romanos in judiciis appellaret: vicerunt tamen clerici, ut[l] et ecclesiasticis et academicis in litibus auctoritatem unicam jus civile

[h] The study seems to have begun to decline at the commencement of the Reformation. Cf. Blackstone, vol. i. p. 21. Long, Two Discourses, p. 87.

[i] Hume, Hist. of Engl., Appendix ii. Blackstone, vol. i. pp. 22, 35. Robertson, Charles V., sect. i. 6, and notes xxiv, xxv.

[k] "Though the close connection which the clergy formed between the canon and the civil law, [cf. Robertson, Charles V., sect. i. 6,] begat a jealousy in the laity of England, and prevented the Roman jurisprudence from becoming the municipal law of the country as was the case in many states of Europe, a great part of it was secretly introduced into the practice of the courts of justice."—Hume, Hist. of Eng., Appendix ii. For the protest of the barons at the parliament of Merton (temp. Hen. III.) see Blackstone, vol. i. p. 19: and cf. Hallam, Middle Ages, vol. iii. p. 517.

[l] Blackstone, vol. i. p. 20.

obtineret: idem in iis quoque judiciis concessum, quæ[m] ad res tùm maritimas tùm bellicas pertinerent; credo equidem, quòd in hujusmodi causis jura gentium sæpiùs agi viderentur.

Factiones[n] inde duæ exstitêre: et primùm quidem foro se regio clerici sensim subducere; mox edicere[o] episcopi, ut ne quis muneris sacri particeps profanis illis judiciis adesset, in quibus videlicèt non leges æquæ, humanæ, venerabiles, sed consuetudines quædam planè barbaræ dominarentur. Contrà verò inventi[p] sunt, qui jus civile detestarentur, et consuetudinibus istis percipiendis se totos dederent: unde originem traxit inveterata illa causidicos inter et clericos simultas, quâ factum est, ut utrique sibi

[m] Blackstone, vol. i. p. 83. The military courts, and courts of admiralty.

[n] Ibid., vol. i. p. 19.

[o] Ibid. Also Spence, vol. i. p. 14, note d, who says, "Innocent IV. A.D. 1252, temp. Hen. III., prohibited the clergy from practising in the secular courts."

[p] Ibid., vol. i. p. 22. The way of magnifying the opposition between the civil and common law inherited from them by our common lawyers is thus spoken of by Robertson: "Even in England, where the common law is *supposed* to form a system perfectly distinct from the Roman code, and although such as apply in that country to the study of the common boast of this distinction with some degree of *affectation*, it is evident that many of the ideas and maxims of the civil law are incorporated into the English Jurisprudence."—Charles V., note xxv.

voluerint persuadere, nihil juri communi quod appellant cum civili cognationis esse.

Quod tamen quàm longè a vero abhorreat, ex iis[q] judicari potest, quæ in foro nostro quotidie versantur: videmus enim non verba tantùm formulasque complures ex Romanorum scriptis apertissimè venisse, verùm etiam (ut omittam alia) legatorum[r] jus omne, donationum tùm mortis[s] causâ tùm propter[t] nuptias, necnon magnâ ex parte id, quod de societatibus[u] hodie tenetur. Pervenêre etiam ad nos duorum[x] jurisperitorum libri, qui quum eodem ferè sæculo sint editi,

[q] "If a man competently acquainted with the civil law should look into our own, he would first be struck with the great number of Latin terms, some used in the Roman sense, some much perverted from their original meaning. If he examined the rules of law, and chiefly those relating to property, contracts, and the interpretation of testaments, he would often find them the same, even if the terms differed: and this not only in that part of the law called equity, and in the law administered in the ecclesiastical courts and some other courts, but also in what we call the common law."—Long, Two Discourses, p. 89.

[r] Cf. Blackstone, vol. ii. p. 512, who refers to Bracton for the law about legacies, and Spence, vol. i. p. 194.

[s] Ibid., vol. ii. p. 514. Spence, vol. i. p. 196.

[t] Long, Two Discourses, p. 100.

[u] "Every writer on the subject refers to the Roman law as forming in great part the basis of the existing law relating to *partnership*."—Spence, vol. i. p. 665.

[x] Glanville and Bracton; for whom see Blackstone, vol. i. pp. 72, 22. Spence, vol. i. pp. 119, 120, 224, 234. Glanville wrote in the time of Henry II. (as is supposed), Bracton in that of Henry III. See Long, Two Discourses, pp. 89, 102.

quo clerici primùm foro cederent, rationem meam videntur vel soli posse comprobare: quare aliena[y] verba malim quàm mea de iis audiatis. "Scripsit ille quidem de legibus consuetudinibusque Angliæ: pertinere ergo ad leges Anglicas ea autumat, quæ in libro suo continentur; horum vero pars magna a jure Romano proficiscitur. Hic autem et dispositionem operis sui et sententias plerasque ab auctoribus Romanis mutuatus est: nec dubitari tamen potest, quin magnâ ex parte jus commune nostrum in scriptis ejus tanquam fundamentis nitatur; immò multa, quæ in iis inveniuntur, exercemus ipsi hodie et vim penitùs abstrusam usu excudimus. Illud etiam animadverto,

[y] The following sentences are translated from passages in Long's "Two Discourses:" the first sentence, which relates to Glanville, from the note on p. 103; the remainder, which refers to Bracton, from p. 89, and the note upon it. Mr. Long has devoted an appendix of some sixteen pages to the investigation of Bracton's Treatise as it bears on the Romanizing character of our common law. In further confirmation of our debts to the Romans, may be cited Lord C. J. Holt, [quoted by Spence, vol. i. p. 286, note.] "It must be owned that the principles of our law are borrowed from the civil law, and therefore governed by the same reason in many things:" and Wood, who in his Preface to a "New Institute of the Imperial or Civil Law, London, 1704," [cited by Long, p. 108,] thus writes; "Upon a review I think it may be maintained that a great portion of the civil law is part of the law of England, and interwoven with it throughout." Even Blackstone talks of "frequent transcripts of Justinian to be met with in Bracton and Fleta, which indicate that the common law was very near being overrun by the civil." Vol. i. p. 22.

quòd ea jura, quæ quasi Anglorum propria Bractonus tradat, permultùm legibus pòst latis vel sententiis judicum mutata sint; eorum autem auctoritati quæ a Romanis sumpserit, nihil ferè unquam recentiorum hominum judicia derogaverint."

Porrò ne tum quidem, quum adesse litibus vulgò clerici desinerent, interclusi sunt omnes aditus, per quos posset in jus nostrum Romanorum prudentia permanare. Non jactaverim equidem hic loci Accursii[z] nomen, fuerit licèt tum in jure civili laudatissimum tum regi illi neque inauditum neque invisum, quem moris est nostratibus velut alterum[a] Justinianum prædicare. Neque in illo vos tenuerim, quòd, centum post annis quàm[b] imperatum esset Tribonianistis silen-

[z] "The son of Accursius, the last of the Glossatores" on the civil law: "he was in England probably from about 1274 to 1281, and employed by Edward I."—Long, Two Discourses, p. 84, note. Cf. Spence, vol. i. p. 131.

[a] "Edward the First, our English Justinian."—Blackstone, vol. iv. p. 418.

[b] The first assault upon the Roman law in England was made by Stephen on the arrival of Vaccarius: this was quite ineffectual: later followed the protest against clerical legislation at the parliament of Merton (temp. Hen. III.): more than a century after the barons declared (temp. Ric. II.) "that the realm of England hath never been unto this hour, nor by the consent of our lord the king and the lords of parliament shall it ever be, ruled or governed by the civil law."—Blackstone, vol. i. pp. 18, 19. Spence, vol. i. pp. 108, 109, 346, 347. Long, Two Discourses, p. 86, and note. At the last epoch Spence says, "The judges prohibited it from being any longer cited in the common law tribunals." Again,

tium, eadem procerum indignatio, interdicta eadem magistratuum audiuntur; perinde quasi nihil Stephano regnante, nihil Henrico actum esset. Namque ut longissimè Romanorum auctoritatem prorogemus, fatendum certè est, post annum demùm ab Angliâ debellatâ tercentesimum in legitimis judiciis nomen Romanum odio atque contemptui fuisse. At verò præter illa legitima aliud[c] etiam tribunal erat, pro quo qui sedebat ex æquo et bono, non ex Anglorum consuetudinibus, judicabat. Quæ res ab origine satis tenui profecta tantis deinde incrementis aucta est, ut et infinitam causarum multitudinem ad se traxerit, et jura ipsa ac leges ex parte non levi flexerit. Et antiquis[d] quidem a regibus ad hoc honoris fastigium perpauci laici evehebantur; nemo [e] ferè ducentis post annis quàm Justiniano cæteris judiciis interdictum

"In the reign of Richard II. all resort to the Roman law in the common law courts ceased."—Vol. i. p. 286.

[c] The Chancellor's Court, or Court of Chancery: "the recognised principles of the decisions in which were honesty, equity, and conscience."—Spence, vol. i. p. 339.

[d] "Excluded from the common-law judgeships, the ecclesiastics still kept possession of the high office of Chancellor, an office then (temp. Hen. III.) of little judicial power."—Blackstone, vol. i. p. 20. Cf. Spence, vol. i. pp. 334, 339.

[e] For this fact see Spence, vol. i. p. 347, who considers it a deliberate policy of Edward III., and the kings who followed him, necessitated in no small measure by the exclusion of the civil law from the ordinary courts.

erat. Ii[f] autem, qui huic magistratui in consilio futuri essent, debebant omnes peritiam suam in jure civili academicis approbavisse. Quorsùm ista? quæso; nisi ut æquum illud et bonum, quod contra injurias cæterorum judiciorum prodituri erant, ex iis auctoribus possent derivare, apud quos tot[g] præclara æquitatis præsidia, tanta exempla corrigendi legum calumnias invenirentur? Nec mirum hæc ita a regibus sapientissimis instituta esse; quum ne ratio quidem ipsa[h] id uni concedi pateretur, ut contra scriptum, contra morem, contra exempla judiciorum ex arbitratu suo et opinione incertâ utilitati litigantium consuleret. Sed de regum consilio quid statueris, parvi refert; obtemperavisse enim reverâ juri Romano eos, qui hâc

[f] The Master of the Rolls, and the Masters in Ordinary, or (as they were afterwards called) Masters in Chancery, for whose original relation to the Chancellor, and required proficiency in the civil law, see Spence, vol. i. pp. 359—363: Long, Two Discourses, p. 87, note. "They were appointed almost universally from those members of the clerical body, who had attained the degree of doctor in civil law."—Spence, vol. i. p. 711.

[g] Such were the whole class of "Utiles Actiones," as they were technically called, in the Roman law; and, in still stricter analogy to our proceedings in "Equity," the remedies which the Prætors were allowed to give "adjuvandi, vel supplendi, vel corrigendi juris civilis causâ." Spence, vol. i. pp. 211—215, 419, &c. Long, Two Discourses, p. 59, &c.

[h] According to Spence this was strikingly illustrated by the caprice and incompetency of the non-clerical, and therefore non-civilian, Chancellors, who intervened between Sir T. More, and Lord Nottingham, vol. i. pp. 712, 713.

potestate usi sunt, cùm querelæ inanes æqualium[i] tùm etiam gravissimorum scriptorum[k] testimonia convincunt.

Neque hæc cuiquam aut levia aut parùm ad rem nostram videri debent: primùm enim jura[l] plurima his olim a judicibus e libris Romanorum hausta in jus nostrum paullatim aut commune aut scriptum recepta sunt; cujusmodi est (ne in exemplis molestus sim) omnis fidei[m] commissorum ratio; deinde, quanquam et ab hôc æquè ac cæteris tribunalibus remoti sint jamdiu[n] clerici et jus civile apud nostros in oblivionem venerit, spiritus tamen ut ita dicam Romani moris in commentariis[o] illis, qui tantopere celebrantur, rerum judicatarum superest. Itaque, ut horridam illam Saxonum antiquitatem omittam, ut vetera juriscon-

[i] The House of Commons (temp. Ric. II. and Hen. IV.) and the common law judges. Spence, vol. i. pp. 343—9, and p. 712.

[k] E. g. Blackstone, vol. i. p. 20.

[l] "As the equitable principles on which the court of chancery acted were better understood, they were in great part adopted by the courts of common law."—Spence, vol. i. p. 713.

[m] Blackstone, vol. ii. pp. 328, 332. Spence, vol. i. pp. 442, &c. Part of this doctrine was brought into the *statute law* under a slight variation of form by the statute of Uses, 27 Hen. VIII.

[n] Wolsey (deprived A.D. 1529) was the last of the regular succession of clerical Chancellors.

[o] The Reports in Chancery now so voluminous date chiefly however from Henry VIII. downwards. Some precedents go back as far as Henry V. The older ones are "founded in great part on the prætorian or equitable portion of the Roman jurisprudence." Spence, vol. i. pp. 712, 713.

sultorum monumenta nihil morer, ut ea quæ leges nostræ habent cum Romanis communia aut taceam aut casu aliquo simulata affirmem, tamen quid Italis debeamus docere una potest illius æquitatis ratio, cui[p] primi hominum, ne dixerim soli, Angli sua judicia, prætorem suum tribuerunt.

At enim rem miram ac pænè incredibilem narravi, qui majores nostros fatear jus civile plus semel detestatos esse, et persuasisse sibi nihil esse ei cum suo commune, eosdem tamen confirmaverim novem[q] ferè sæcula haurire quicquid usui esset ex eo consuevisse. Perinde quasi hæc sibi parùm constent: attendite enim, quæso, paullisper, dum id quod sentio exponam. Causam igitur variæ illius fortunæ, quâ usum est hâc in republicâ jus civile, in nomine, non in re, sitam esse video: quod quum aliis acceptum, aliis suspectum esset, gratiosum aliàs, aliàs invidiosum, ii[r] qui Romana omnia venerarentur, intulerunt jus istum, foverunt, celebraverunt; ii autem, qui Pontificum Italorum

[p] "This distinction between law and equity, as administered in different courts, is not at present known, nor seems to have been ever known in any other country at any time."—Blackstone, vol. iii. p. 49.

[q] Sc. from about 600 to about 1500 A.D.

[r] Blackstone, vol. i. p. 18, &c. Spence, vol. i. pp. 16, 17. "Such was the admiration in which every thing Roman was held by the Christian priesthood, that it was extended even to the pagan writers."

jugum aut[s] fastidirent aut[t] penitùs excussissent, reprehenderunt, exagitaverunt, denique verbo tenus proturbaverunt. Quòd vero reâpse tot casibus nomine tantùm dissimulato superfuerit, et quasi hôc in solo firmiter radices egerit, id singularis[u] ejùs æquitas atque utilitas effecit.

Nec mirum in procellis istis et quasi temporum fluctibus, quibus tota ferè Europa tercentis abhinc annis jactabatur, tùm alia multa tùm etiam juris[x] civilis scientiam interiisse. Quippe homines novitate rerum perculsi, quum nuper se e tenebris nigræ cujusdam et voraginosæ Charybdis in lucem ac libertatem crederent evasisse, quodcunque Romam referret, quodcunque prioris ævi studia, aversabantur et summis viribus nitebantur effugere. Nos vero, ad quos nonnisi historicorum scriptis motus hi animorum pervenêre, quid est quòd dubitemus exempla ea, quæ usui futura sint, quâvis ex ætate repetere? quid est, quòd[y] in tenebris, ut aiunt, diutiùs operemur? quid, quòd, ea[y] jura quum tractemus quæ ab antiquitate

[s] Edward III. and his parliament. Spence, vol. i. p. 346.

[t] Those who lived under Henry VIII. and again under Elizabeth. Spence, vol. i. pp. 462, 347.

[u] Hume, Hist. of Engl., chap. xxiii.

[x] A fanatical prejudice against the Roman law (and that quite as much because it was *law* as because it came from *Rome*) is attributed by Hooker, (Pref. to Eccl. Pol., ch. viii. § 4,) to the Puritans; by Melanchthon, (De Legibus, p. 580,) to some of his own countrymen.

[y] Long, Two Discourses, pp. 90, 91.

prudentissimâ propagata sint, prudentiam omnem (quantum liceat) et quasi mentem ac voluntatem antiquitatis ejus nolimus explorare?

Jam verò, ut concedantur mihi tria illa quæ initio posui, inquirat fortasse aliquis, cuinam ordini civium hæc studia velim commendare: utrùm omnibus? an solis jurisconsultis? quum multos quidem vitæ suæ institutum a nostrâ ratione avocet, jurisconsulti autem periculum sit ne, si ad leges inter se contrarias adverterint animos, quid suum, quid Romanum, in re quâque, interdum obliviscantur. Equidem sanè ea valdè demiror, quibus centum abhinc annis vir[z] doctissimus, quàm utilis esset in omni vitâ juris scientia, academicis nostris ostendere conatus est; nec magni laboris fore arbitror eadem ferè ad meam causam accommodare. Video autem in civitate nostrâ duo potissimùm esse genera hominum, quibus sperem hæc studia uberrimos fructus allatura esse: quorum alterum in respondendo de jure atque in causis orandis versatur, alterum in ferendis legibus, jubendis, antiquandis, corrigendis.

Et de illis quidem haud scio an verecundè mihi et dubitanter dicendum sit, quum ipsi quid suâ intersit et possint et velint[a] dijudicare: quanquam homines

[z] Blackstone, in his first introductory lecture.

[a] Perhaps the *recent appointment* of a reader on jurisprudence *and the civil law* by the Society of the Middle Temple is sufficient evidence of the present judgment of the profession. See the beginning of Long's Two Discourses.

satis doctos sæpissimè queri intelligo, quòd et[b] in judiciis pleræque quæstiones ad res ante judicatas, non ad juris principia, revocentur, et peritia[c] omnis hujusce ævi in exercitatione videatur consistere. Quòd si Romanis in legibus major lucet æquitatis ratio, si elementa juris omnis, si principia quædam et quasi semina Anglorum jurisprudentiæ continentur, non absurdum fuerit, ut opinor, suadere, ut his se priùs isti litteris imbui patiantur, quàm ad nostrorum libros et consuetudinem judiciorum accedant. Nec metuam equidem ne is, qui Romana didicerit, ambigui juris errore inter agendum aliquandò decipiatur: nam et in iis levioribus, quæ, quum idem de principiis senserint, possint aliæ aliter civitates constituere, novissima quæque definitio antiquiores memoriâ pellet; et, ubicunque Angli longiùs a sententiâ Romanorum recesserint, si benè novatum sit, virtute suorum arrectus animus tenebitur; sin minùs, oblivionis metum tollet indignatio. Neque inutile quisquam duxerit, in nostrâ præsertim civitate, in quâ partes tam magnæ jurisperitis in legibus interpretandis tribuantur, eâ eos copiâ æquiorum exemplorum instrui, ut legum patriarum vitiis et sciant et cupiant subvenire.

Alterum autem genus eò tangam audentiùs, quò

[b] Hallam, Middle Ages, vol. ii. p. 469.

[c] See Long, who does but echo a complaint made by Blackstone a century since. Vol. i. pp. 30—32, &c.

minùs certâ aliquâ disciplinâ instituere se et parare ad munus suum capessendum consueverint. Cedò enim, ei, qui ad rem publicam accessurus sit, eruditione nullâ opus esse putabimus? perinde quasi (quod in poetis celebratur) nascatur senator, non fiat. Contra verò illius omnis doctrinæ, quæ ad vitam hominum moresque pertinet, nulla ferè pars est, quam non deceat senatorem, perpaucæ, quas non oporteat tetigisse. Quid philosophiam loquar? quid historiam? Mei certè officii magis proprium est jurisprudentiam nominare: in quâ parvum est, ut suæ quisque patriæ instituta perspexerit; illa majora, ut formam et tanquam faciem æquitatis cognoverit, ut exempla optima legum condendarum teneat, ut jura[d] gentium exterarum etsi latiùs pateant summatim tamen et quasi per compendium comprehendat. Quæ quum omnia eum, qui jus Romanum tractaverit, consecuturum esse supra docuerim, nolim cætera incitamenta horum studiorum recensere, quæ et minora sint et fortasse etiam apud posteros nusquam futura. Cujusmodi est id quòd pluribus[e] in provinciis nostris jus Romanum vulgò

[d] "He who wishes to know what Roman law is, as received in any European state, will have no difficulty in mastering these modifications, when he knows that which has been modified."—Long, Two Discourses, pp. 42, 43. Again, "The shortest and only sure way of obtaining a competent knowledge of the Roman law, as it exists in any modern country, is to know what the Roman law is in the compilations of Justinian."—Ibid., p. 92.

[e] British Guiana, the Cape of Good Hope, Ceylon, Trinidad,

usurpatur: quod, seu mutandum sit seu retinendum, iis certè, quibus id genus deliberationum permittitur, non omninò ignotum esse debet. Possem quoque nonnulla vobis judicia[f] commemorare, quæ ad ejusdem juris normam in ipsâ Angliâ exercentur: sed hæc omnia libens prætereo; neque enim ea jam sequor, quæ certorum sint aut hominum aut temporum propria, sed potiùs ea, quæ ad rempublicam universam pertineant.

Quid igitur suadeo? quamobrem vos jamdiu moror? Suadeo equidem, ut revocentur illæ artes, per quas nomen hisce sedibus et fama ætate anteactâ creverint; quibus ut studeret pubes ingenua collegiorum nostrorum conditores edixerint; quarum titulos inanes quasi ludibria honoris causâ hodie geramus. Ut qui interpretes legum Anglicarum quique latores olim futuri sint, ex hâc doctrinæ (ut ita dicam) officinâ juris ejus scientiâ instructi prodeant, quod populus ad leges ferendas natus jusserit, quod totius Europæ consensus approbaverit, quod denique majores nostri magnâ ex parte voluerint imitari. Ut qui a Græcis philosophiam, a Romanis jurisprudentiam petamus; nec quum veriori sapientiæ tironum aures Aristotele lecto præcludi negemus, metuere videamur, ne magister Tribonianus arctioribus studiis jurisconsultorum aliquandò noceat.

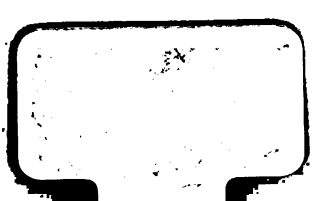
Sainte Lucie, the Mauritius, Lower Canada, Malta. See Long, Two Discourses, p. 92.

[f] The Ecclesiastical courts, the University courts, the Admiralty court, and the Military court.

Quòd si qui olim extiterint, qui re diu considerată jus omne meliùs, quam est apud illum, tractaverint, libentissimè equidem Justiniani libros eodem[g] judicio, quo ille commentarios superioris ævi, condemnem: quoad verò omnes consensu pænè servili Romanorum jura certent extollere, non possum quin e republicâ esse diffitear, ut in tenebris bibliothecarum neglecta algeant.

[g] "Justinian forbade all commentary on his collections, and *prohibited the citation of older writings.*"—Smith's Biographical and Mythological Dictionary, Art. "Justinian." See the first and second prefaces to the Digests.

EDVINUS PALMER,

COLL. BALL. SOC.

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